In the

United States Court of Appeals

For the Ninth Circuit

WESTERN BOAT BUILDING COMPANY, a Partnership, and UNITED PACIFIC INSURANCE COMPANY, a Corporation, *Appellants*,

vs.

J. J. O'LEARY, Deputy Commissioner, 14th Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act, and ROBERT MARKOVICH, *Appellees*.

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF STATE OF WASHINGTON AMICUS CURIAE

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STATEMENT DISCLOSING JURISDICTION

This is an appeal by an employer from a final order of the United States District Court for the Western District of Washington, Southern Division. The Department of Labor and Industries of the State of Washington, which had taken jurisdiction of the injury and made payments to the injured man, which payments were accepted by the injured man, was never at any time made a party to the matter. The Deputy Commissioner under the Longshoremen's and Harbor Workers' Act, took

jurisdiction and made an award subsequent to the time the State of Washington made its award. The District Court affirmed the action of the Deputy Commissioner, and employer has appealed.

STATEMENT OF THE CASE

The injured workman, Robert Markovich, was working upon a tug, which tug had been pulled upon a marine railroad. The marine railroad is on the land but a portion of the railroad extends into the water and the tug being repaired had been placed on said railroad and pulled out of the water onto the land. The workman fell from said tug, while working upon it, to the shore below where he sustained his injuries.

The legislature of the State of Washington in the year 1925 enacted chapter 111, which *inter alia* reads as follows:

> "Section 18-a. The provisions of this act shall apply to all employers and workmen engaged in maritime occupations for whom no right or obligation exists under the maritime laws for personal injuries or death of such workmen.
>
> "If an accurate segregation of pay rolls covering any class or classes of workmen engaged in maritime occupations and working part time on shore and part time off shore cannot be made by the employer, the director of the department of labor and industries is hereby authorized and directed to fix from time to time a basis for the approximate segregation of the pay rolls of such class or classes of employees to cover the shore part of their work, and the employer shall pay to the accident fund on that basis for the time such workmen are engaged in their work."

Following the above section of the statute, the director of labor and industries placed the employer, the

Western Boat Building Company, a partnership, and the employee, Robert Markovich, in the proper class and proceeded to levy upon the Western Boat Building Company, a partnership, its tax as provided by law, and when the injured workman was injured, the Department of Labor and Industries proceeded to entertain his claim and to pay to him the proper amount for his injuries, all because they had segregated the work which men were doing for the Western Boat Building Company, and the work that Robert Markovich had done, being on the land and on a marine railroad, they proceeded to pay him in accordance with the law.

SPECIFICATION OF ERRORS

1. The Deputy Commissioner erred in taking jurisdiction and the District Court erred in affirming the Commissioner.

2. The parties erred in attempting to bind the Department of Labor and Industries of the State of Washington, as to past payments made to Robert Markovich and as to the future course of the department, the department never having been a party before the Commissioner or the District Court.

ARGUMENT

The coverage under the Longshoremen's and Harbor Workers' Compensation Act is found in the Act of March 4, 1927, Chapter 509, section 3, 44 Stat. 1426; section 903 of Title 33 of the United States Code, 1946 edition. The section as to coverage reads in part as follows:

> "a. Compensation shall be payable under this chapter in respect to disability or death of an employee, but only if the disability or death results

> from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings, may not validly be provided by State law. * * *"

In 1936, the Supreme Court of the State of Washington, sitting *en banc*, reviewed all of the Washington cases and the United States Supreme Court cases up until that time of the clause, "if recovery for the disability or death through a workmen's compensation proceeding may not validly be provided by state law."

After reviewing both the decisions of the Supreme Court of the United States and the decisions in the State of Washington, the Supreme Court of the State announced this doctrine in the case of *Puget Sound Bridge & Dredging Co. v. Department of Labor & Industries*, 185 Wash. 349, 352:

> "From these decisions, it is clear that, primarily, the criterion by which it is to be determined whether the claim of an injured workman comes under admiralty jurisdiction or under a state compensation act is the *place where* the injury was sustained. If the injury occurs on navigable water, the rights of the workman and the liability of his employer are to be determined by maritime law. If he is injured on land, his rights are governed by the state compensation act, notwithstanding he may be engaged in maritime work."

The State Supreme Court then cites the law in the State of Washington and in arriving at its conclusion the Supreme Court of the State cited the following United States Supreme Court cases:

> *Southern Pacific Co. v. Jensen*, 244 U. S. 205.
> *Minnie v. Port Huron Terminal Co.*, 295 U. S. 647.
> *Smith & Son v. Taylor*, 276 U. S. 179.
> *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469.

Gonsalves v. Morse Dry Dock & Repair Co., 266 U. S. 171.
Sultan R. & T. Co. v. Department of Labor & Industries, 277 U. S. 135.
Miller's Indemnity Underwriters v. Brand, 270 U. S. 59.

WAS RECOVERY VALIDLY PROVIDED BY STATE LAW?

"Validly be provided by State law" has been interpreted to "refer to authority of state to act, not to inquiry whether state has exercised power."

U. S. Casualty Co. v. Taylor, 64 F. (2d) 521, 522.

State provision for the injured man is sustained by the following U. S. Supreme Court cases:

Southern Pacific Co. v. Jensen, 244 U. S. 205.
Sultan R. & T. Co. v. Department of Labor & Industries, 277 U. S. 135.

In referring to the *Jensen* case, 244 U. S. 205, 216, the Supreme Court of the United States said:

> "The Washington statute represents a state effort to clarify the situation."
> *Davis v. Department of Labor & Industries*, 317 U. S. 249.

And again in the *Davis* case the Supreme Court of the United States, after quoting Rem. Rev. Stat., §§ 7674, 7693a and the Longshoremen's and Harbor Workers' Act, 33 U. S. C. § 901, said,

> "Here again, (Longshoremen's and Harbor Workers' Act) however, Congress made clear its purpose to permit state compensation protection whenever possible, by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.' "
> *Davis v. Department of Labor & Industries*, 317 U. S. 249.

THE PLACE OF THE INJURY

In this cause, Mr. Markovich testified as follows (Tr. 34):

"Q. Calling your attention particularly to the tug boat El Sol, where was this tugboat situated when you were working on it?
"A. It was on the marine ways, that is, on the farther side. I don't know whether you would call it—that was on the ways—marine ways No. 1.

"Q. Where is that situated?
"A. In the yard there."

Transcript of Record, page 34. Testifying further, Mr. Markovich says (Tr. p. 35):

"Q. And this marine railway you speak of—does this railway run down into the water?
"A. Oh, yes.

"Q. Do you know how far out it runs into the water?
"A. Oh, I should judge about a hundred—hundred and fifty feet.

"Q. And this tugboat El Sol had been placed on a cradle, and had it been taken up out of the water?
"A. Yes.

"Q. It was standing on the marine railway at the time you were working on it?
"A. Yes.

"Q. Do you know how far up on the end of the railway it had been drawn up? Do you have any idea how far up?
"A. How far up?

"Q. Yes, from the end of the railway—how far had it been drawn up? I am speaking of the end that runs down into the water, Mr. Markovich?
"A. I don't know. I can't answer that.

"Q. You don't know then?
"A. It was quite a ways. It was pulled out so that we was able to work around the boat, so that—well, so it lay in a straight place so we could

work all around the boat when the tide came in —the high tide.

"Q. When the high tide came in, would part of the keel still be in the water?
"A. Part would be.

"Q. Do you know how long the boat had thus been up on the railway?
"A. I don't think it had been there very long—few days, or about a week."

The work that Mr. Markovich was engaged in was a matter of purely local concern unconnected with navigation and was essentially not maritime in its nature. Upon a marine railway, the boat is hauled up by some power other than its own and not connected with navigation, out of the water and to a point upon the land where the boat remains until its future is determined by its owner. It may return to its native elements, or it may be destroyed with or without the intention to terminate its career as a vessel. In the instant case the man was working on the shore and in duty not connected in any way with navigation.

Rholfs' v. Dept. of Labor & Industries, 190 Wash. 566, 570.

A reference to the Shepard's Citator, 1951, shows no change in the *Rholfs'* case but does show that the law in the *Rholfs'* case is the law in the State of Washington at this time.

In *State Industrial Commission of New York v. Nordenholt Corp.*, 259 U. S. 263, the Supreme Court of the United States employed a strict geographic test, holding that a longshoreman injured while working on land remained covered by the State Workmen's Compensation Act in question.

A reference to Shepard's Citator shows this case has never been overruled.

In the above case, the U. S. Supreme Court, in reviewing *Southern Pacific Co. v. Jensen*, 244 U. S. 205, said:

> "The injury therein occurred on navigable waters."

The court also reviewed the case of *Atlantic Transport Co. v. Imbrovck*, 234 U. S. 52, 59, 60, and also pointed out that the injury in that case occurred in navigable waters.

In the New York case the U. S. Supreme Court pointed out that in contract cases admiralty jurisdiction depended on the nature of the transaction while in tort cases the location determined the jurisdiction, and further said injuries to workmen fell under the head of contracts.

No appeal having been taken from the order of the Washington compensation award to the proper state court, and the Washington State Department, never having been a party, the jurisdiction of the state department is not now before this court. *Desper v. Starved Rock Ferry Co.*, a corporation. No. 231, October term 1951. Supreme Court of the United States.

CONCLUSION

The state had jurisdiction, as the matter of the injury of Robert Markovich was sustained under a solid and existing contract with the State of Washington, and the exclusive jurisdiction was in the State of Washington.

Respectfully submitted,

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